Lhoist North America of Alabama, LLC, A Subsidiary of Lhoist North America *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 563. Case 10–CA–221731

April 21, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

On May 21, 2020, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified below,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 4 and 5 and renumber accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Lhoist North America of Alabama, LLC, a subsidiary of Lhoist North America, Calera, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees because of their union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[1] The General Counsel also filed a motion to strike the Respondent's supporting brief. The motion asserts that the Respondent's supporting brief is procedurally deficient under Rule 102.46(a) and that, therefore, the Board should strike the supporting brief and find that certain of the Respondent's exceptions are waived. Given our disposition of the case, we find it unnecessary to address the merits of the General Counsel's motion.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias against it. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] For the reasons set forth below, we agree with the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending and discharging Desilynn "Floyd" Avery for engaging in union activity when participating by telephone during work time in an unemployment compensation hearing. We find it unnecessary to pass on the judge's additional conclusions that the Respondent violated Sec. 8(a)(1) by suspending and discharging Avery for engaging in protected concerted activity and based upon an overbroad application of Sec. 16.3 of the collective-bargaining agreement. We do, however, agree with the judge that Sec. 16.3 was inapplicable to Avery's cell phone participation in the hearing while at work, and that the Respondent's reliance on that provision and on an alleged cell phone policy that did not exist at the time of the events at issue was pretextual.

In finding that the General Counsel met his initial burden of proving that the suspension and discharge were motivated by animus against Avery's union activity, we first note that Avery, the Charging Party Union's vice president, was engaged in union activity when he participated in the hearing, and that the Respondent knew as much because its director of human resources was also on the call. As further evidence of knowledge and direct evidence of animus, we rely on the statements by two of the Respondent's officials, Senior Human Resources Manager Emily Berkes and Production Manager Grant McCallum, that Avery was suspended and discharged for engaging in "union business." As the judge correctly stated, "[t]hese statements alone are 'independently sufficient to demonstrate unlawful discrimination,'" quoting from *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 5 (2018), enfd. 774 Fed. Appx. 4 (D.C. Cir. 2019). Although the judge discussed several additional circumstantial evidence factors as further supporting an inference of unlawful antiunion motivation, we rely only on evidence of the Respondent's pretextual defenses and its disparate treatment of Avery, who was suspended and discharged for using his cell phone for doing "union business" on company time, whereas the Respondent generally permitted other employees to use their cell phones for personal calls on working time.

We find unconvincing the Respondent's defense that it would have discharged Avery even in the absence of his union activity because the call was unrelated to work and took place during "company time," and because Avery failed to notify his supervisor of the call and to correct his time record. As just noted, the Respondent generally permitted employees to take personal calls on working time, and it did not show that it has required other employees to notify their supervisor or correct their time record after doing so. The Respondent did discharge one temporary employee for multiple instances of using a cell phone on working time, but it introduced no evidence that it has ever discharged anyone for a single instance—except Avery, who was suspended and discharged expressly for using a cell phone to do "union business."

[4] We have amended the judge's conclusions of law consistent with our findings herein. Because we believe our standard remedies are sufficient in this case, we have amended the judge's recommended remedy to remove the additional posting and notice-mailing requirements. We shall modify the judge's recommended Order to conform to our findings, our standard remedial language, and in accordance with our recent decisions in *Danbury Ambulance Service, Inc*., 369 NLRB No. 68 (2020), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76, slip op. at 2–3 (2021). We shall substitute a new notice to conform to the Order as modified.

(a) Within 14 days from the date of this Order, offer Desilynn "Floyd" Avery full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Desilynn "Floyd" Avery whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Desilynn "Floyd" Avery for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) File with the Regional Director for Region 10 a copy of Desilynn "Floyd" Avery's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension and discharge, and within 3 days thereafter, notify Desilynn "Floyd" Avery in writing that this has been done and the suspension and discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Calera, Alabama facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 7, 2018.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

Dated, Washington, D.C. April 21, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[5] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, offer Desilynn "Floyd" Avery full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Desilynn "Floyd" Avery whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and we will also make him whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Desilynn "Floyd" Avery for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 10 a copy of Desilynn "Floyd" Avery's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Desilynn "Floyd" Avery, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

LHOIST NORTH AMERICA OF ALABAMA, LLC, A SUBSIDIARY OF LHOIST NORTH AMERICA

The Board's decision can be found at or www.nlrb.gov/case/10-CA-221731 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1943.

Joseph W. Webb, Esq. and *Nathan K. Gilbert, Esq.,* for the General Counsel.

M. Jefferson Starling, Esq. and *Irving Jones, Esq.,* for Respondent.

Richard P. Rouco, Esq., for Charging Party Union.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. This case was tried in Birmingham, Alabama on February 4 and 5, 2020. Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 563 (Union) filed the charge on June 7, 2018 against Lhoist North America of Alabama, LLC, a Subsidiary of Lhoist North America (Respondent). The Union filed first and second amended charges respectively on June 13 and October 1. General Counsel issued the complaint on November 15, 2019 and Respondent filed its Answer on November 27, 2019.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a limited liability company, is engaged in mining and processing limestone at its facilities throughout the State of Alabama, where it annually sold and shipped from its Alabama facilities goods valued in excess of $50,000 directly to points

[1] The parties filed a Joint Motion to Correct the Transcript, which included numerous errors. That motion is hereby granted.

[2] Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. Indeed, although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Lincoln-Mercury-Mitsubishi, Inc*., 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the

outside the State of Alabama. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulate, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. COMPLAINT ALLEGATIONS

The Complaint alleges that employee Desilynn "Floyd" Avery (Avery) engaged in union and protected concerted activities when he participated in an unemployment hearing on behalf of a discharged former coworker. Respondent, on June 5, 2018 and June 11, 2018 respectively, suspended Avery pending investigation and then discharged him. General Counsel alleges violated Section 8(a)(1) in retaliation for Avery's protected concerted activity and Section 8(a)(3) of the Act for Avery's union activities.

The Complaint also alleges that Respondent violated Section 8(a)(1) of the Act regarding Respondent's reliance upon Section 16.3 of the implemented terms and conditions of employment in its suspension and termination of Avery:

> Employees attending union conventions or meetings, third step grievance meeting(s), arbitration hearing(s) and labor negotiations will be allowed unpaid leave of absence at the Company's discretion and within limitations of its operating needs and requirements without pay provided that no more than five (5) total employees are absent at the time and the request for leave shall be in writing by either an international or local Union officer provided one (1) week's notice is given to the Company in advance of leave. The Union will be responsible for paying these employees their wages for this union leave of absence.

General Counsel further contends that Respondent's actions violate Section 8(a)(1) by enforcing the above rule and in response to Avery's protected concerted activities to suspend and terminate Avery.

III. FACTS

A. Background

Respondent operates 2 quarries and 3 lime manufacturing plants in the State of Alabama. (Jt. Stip. ¶1.)[3] It has approximately 200 employees. (Tr. 256.) The events at issue primarily occurred at Respondent's Montevallo plant, located in Calera, Alabama. The Montevallo plant receives raw materials to produce lime and lime products, then ships the products. (Tr. 368.) Approximately 50 hourly employees work at the Montevallo plant. (Tr. 407.)

The Montevallo production manager is Grant McCallum, who reports to Plant Manager, Craig Gordinier. Four persons report to McCallum, including Terry Beam, the loading supervisor. Stacey Barry is HR Director for the East Region, which covers the Alabama facilities, including Montevallo. Barry is the ultimate decision-maker for terminations. (Tr. 230.) Barry reports to the vice-president for human resources for Lhoist North America. Emily Berkes[4] is Respondent's senior human resources manager, east lime and reports to Barry. (Tr. 298.) Berkes' office is located at the Alabama Regional Office in Calera. (Tr. 410.)

The Union represents the bargaining unit at Respondent's facilities. The bargaining unit covers the production and maintenance employees, including mine and quarry employees, truck drivers and heavy equipment operators. After October 30, 2017, following an impasse in bargaining, Respondent and the Union operated under unilaterally implemented terms and conditions of employment. (Jt. Stip. ¶8; Jt. Exh. 3.) The Union filed unfair labor practice charge over the implementation, but the charge was withdrawn. (Tr. 77–78.)

> The implemented terms and conditions included two provisions about union leave:
>
> Section 4.1(c), Section 4.1 Union Committee and Meetings
>
> The Company will compensate employees for time lost from scheduled work when it calls a general interest meeting (excluding third step grievance meeting(s), arbitration hearing(s), union meeting(s) and conference(s), and labor negotiations) to meet with employee(s) in accordance with this Article.
>
> Section 16.3, Union Leave (under Article 16, Leaves of Absence):
>
> Employees attending union conventions or meetings, third step grievance meeting(s), arbitration hearing(s) and labor negotiations will be allowed unpaid leave of absence at the Company's discretion and within limitations of its operating needs and requirements without pay provided that no more than five (5) total employees are absent at the time and the request for leave shall be in writing by either an international or local Union officer provided one (1) week's notice is given to the Company in advance of leave. The Union will be responsible for paying these employees their wages for this union leave of absence.

The Union did not agree to Respondent's changes in Section 16.3 of the implemented terms and conditions, which were significantly different than the section in the expired collective-bargaining agreement. Under the previous collective-bargaining agreement, effective from January 2014 until December 1, 2016, Section 16.3 provision stated:

Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc.,* 193 NLRB 47, 48 (1971); *Fed. Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *L.S.F. Transp., Inc.,* 330 NLRB 1054, 1063 (2000) fn. 11 (2000); *Asarco Inc.,* 316 NLRB 636, 640 (1995) fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

[3] The following abbreviations are used in this decision: Jt. Stip. for Joint Stipulation; Jt. Exh. for Joint Exhibit; GC Exh. for General Counsel exhibit; GC Br. for General Counsel brief; R. Exh. for Respondent exhibit; R. Br. for Respondent brief; U. Exh. for Union exhibit; and, U. Br. for Charging Party Union brief.

[4] Berkes is now known as Emily Kelley and testified under that name. For consistency with the documents, Berkes is the name used throughout the decision.

> Employees attending union conventions or meetings with be allowed leave of absence without pay, provided that no more than five total employees are absent at the time, provide one week's notice as given to the company by the union in advance.
>
> Employees on Union Leave will receive their regular pay for the period of the leave. The Company will be reimbursed by the Union for wages paid during Union Leave.

(R. Exh. 10 at 18.) Thus, Section 16.3 in implemented terms and conditions expanded to include third step grievance meetings, arbitration hearings, and negotiations, and no pay for those events, with the requirement of one week's notice upon these additional union activities and relied upon Respondent's discretion.

In addition to the charge about Respondent's unilateral implementation, the local union filed a number of charges in 2017 and early 2018. Wilson testified that, in early 2018 during a third step grievance meeting that was not going well, with HR Director Stacey Barry told them they could go file a labor board charge. Avery and Business Representative Michael Smith were present. (Tr. 198–200.) Barry made a similar comment a few months later in another third step grievance meeting. (Tr. 201–202.) Wilson could not recall which grievances were discussed at the third step meeting. A number of Board charges were pending at the time. (Tr. 206–207.)

Barry was present when these employees testified. The following day, he denied making these statements but presented a different situation at the third step grievance meeting on March 7, 2018. Barry contended that the Union's Business Representative, Mike Smith, was not happy when Barry said Respondent would provide an answer to the grievance in 10 days. Barry maintained that Smith was the person who said he would file a Board charge, to which Barry replied, "You have to do what you got to do." (Tr. 319–320.) Barry testified that Smith made the same statement at a later meeting.

IV. RESPONDENT SUSPENDS AND TERMINATES EMPLOYEE AND UNION VICE PRESIDENT AVERY

A. Background

Respondent employed Avery for 27 years at the Montevallo facility before it terminated him in 2018. Avery's supervisor was Terry Beam, the loading supervisor. In this facility, Avery was the only slurry operator. The slurry operator job entails mixing hydrated lime and water, then sampling it and loading the finished product onto a truck. (Tr. 24.) Slurry is usually mixed once or twice each week. The mixing process alone takes approximately 4–6 hours with samples checked during the mixing process. After approximately 1 hour of mixing time, Avery usually fills a water truck, then drives the water truck while spraying the plant down. (Tr. 25–26.)

McCallum testified that Avery was known to help out in other areas of the plant, including driving the water truck. (Tr. 388.) The water truck runs all day during the summer months. (Tr. 162.) Avery testified, without contradiction, that the laborers, who are in the same bargaining unit, are assigned specifically to the water truck duties. (Tr. 46, 94–95.) The slurry operator also occasionally loads trucks with product. He also may assist with bagging lime and stacking 50-pound bags in the bagging shed. (Tr. 137–138.) The job description does not list the water truck or helping with bagging lime as job duties. (R. Exh. 11.)[5] If Avery is not present for a shift, two possible laborers may fill in for him for the slurry duties. (Tr. 93–94.)

Avery usually worked Monday through Friday on the day shift. Avery, like the other employees in the plant, clocked in when arriving at work and clocked out if leaving the facility. Lunch was a non-paid 30-minute break, which was automatically deducted from pay. For a regular 8-hour shift, employees received a 15-minute paid break. Employees did not clock out for lunch or break unless they left the plant. (Tr. 412.)

Avery was a union member for as long as he worked at the facility and held a number of union offices during his tenure. Avery served as a shop steward. He served as the local union vice-president, a position he held for 8 years, including the period involved here. (Tr. 27, 73.) In 2018, he also served as acting president. (Tr. 33.) In his role as vice president, Avery attended all arbitrations. (Tr. 34.) He also was involved with negotiations for collective-bargaining agreements at least 3 times. (Tr. 75.) Avery was outspoken about Respondent's proposed contract changes during the negotiations that started in the fall of 2016. McCallum testified that Avery was known as a strong employee advocate who frequently challenged management.

Avery also received telephone calls from Barry and Berkes to discuss union matters during his working time. (e.g., Tr. 49, 140–141.) When Avery received such calls, Respondent did not require him to change his working time or to clock in and out. One such topic Avery discussed with Barry was that the bargaining unit employees were unhappy with the implemented terms and conditions of employment. (Tr. 71.)

For 25 years before January 2017, Respondent did not claim that Avery had any disciplinary action. Overall, Avery was known as a hard worker and one who did not have an absenteeism problem. McCallum testified that he had no problem with Avery's work ethic.

In January 2017, Avery received an occurrence counting towards absences and a final written warning. The two disciplinary actions were incurred for one incident: Avery had a no-call, no-show shift on January 4, after his vacation when he was confused about his return date. Under "Attendance Expectations," the rule states:

> It is your responsibility to contact your Supervisor as soon as you know or think that you cannot report to work, will be late for work, or must leave early. This is necessary so that adjustments can be made to the schedule and an appropriate replacement can be notified. Your Supervisor should be contacted as soon as possible or at least 1 hour before your starting time. In all cases, actual reasons for absences are expected to be given. Failure to report for work without notifying your Supervisor may result in termination of employment . . . .

(R. Exh. 1.)

In the section for "Intervention Steps," Respondent's rules

[5] The slurry operator's job description lists two essential functions: Performing duties related to safe and efficient operation of the lime and slurry machines; and, performing all other tasks not specifically indicated. (GC Exh. 3.)

provide that a no-call, no-show warrants a final written warning and a second offense "may result in termination of employment without any additional interventions." (Tr. 27–28; Jt. Exh. 4.) The Employee Handbook, in effect since 2016, states the rule differently:

> The first instance of a "no call/no show" will typically result in a written/formal reminder. The second separate offense may result in progressive disciplinary action leading up to and including termination of employment . . . .

(R. Exh. 5, p. 16.)

Avery filed a written response with Plant Manager Gordinier, but apparently did not file a grievance. (Tr. 30–31; Jt. Exh. 5; GC Exh. 2.)

Whether this final written warning was supposed to "fall off" Avery's disciplinary history after 1 year was controverted. Most disciplinary actions are removed 1 year after receipt of discipline if the employee incurs no further disciplinary actions. Attendance occurrences "are initially counted in a 6-month rolling period from the date of the first occurrence. Occurrences expire as indicated in the Intervention Steps Procedure." In addition, any "shift interruption" accrues a ½ occurrence. (R. Exh. 1.) Avery incurred no further disciplinary action until an event on January 22, 2018.

B. January 26, 2018: Respondent Presents Avery with a Last-Chance Agreement for Taking Off Work for an Arbitration

On January 26, over a year after Avery incurred the written warning for a no-call/no-show, Avery signed a last chance agreement after he attended an arbitration hearing on behalf of the Union. (Tr. 32.) Respondent contended that Avery's no-call/no-show occurred when Avery failed to report to work and instead attended an arbitration hearing in his capacity as union vice president and acting president. (Tr. 33.) He did not advise his supervisor that he would be attending the arbitration because he never informed the supervisor before; the company representatives previously told his supervisor. (Tr. 33–34.) Present for the Union, in addition to Avery, were Union Staff Representatives Michael Smith and Kevin Johnson. Present for Respondent were HR Director Barry, HR Manager Berkes and Attorney Starling. No management representative commented on Avery's presence at the arbitration. Avery's supervisor did not contact him on his cell phone about his absence from the plant. (Tr. 34.)

When Avery returned to work the following day, January 23, Supervisor Beam directed Avery to Production Manager McCallum's office. (Tr. 36.) Avery provided to management a written statement about why he did not notify management about attending the arbitration hearing. In his statement, Avery stated he believed as acting president the company would inform his supervisor that he was excused from work. He closed the statement with the promise to provide Respondent with something in writing for arbitration hearings he intended to attend. (R. Exh. 4.)

On January 26, Avery attended a meeting in the facility's conference room with HR Director Barry, HR Manager Berkes, Production Manager McCallum, and shop steward Robert Lacey. Barry told him that the meeting was about the no-call/no-show. Barry stated that the "higher-ups" wanted Avery terminated but Barry did not, so he was presenting him with a last chance agreement.

Avery said he did not think it was right because he never gave notice to a supervisor before needing to attend an arbitration.[6] Barry read to Avery Section 16.3 of the implemented terms and conditions of employment. Barry told Avery that, if he did not sign, Avery was agreeing to resign voluntarily. Avery signed the last chance agreement because he needed his job. (Tr. 39–41.)

The last chance agreement stated that Respondent's attendance policy requires employees to notify their supervisor of an absence at least 1 hour before the scheduled start time; further, Section 16.3 of the implemented terms and conditions required a union official to provide Respondent, in writing, at least 1 week's notice in advance of need for union leave. The letter body stated the last chance agreement remained in effect for 12 months from the date of the letter. In the acknowledgement and agreement, the letter stated, "I understand that if I violate any policies, rules or regulations during the next twelve (12) months my employment will be terminated immediately and that I will not receive any further warnings." The letter required Avery to waive his right to file a grievance on the matter. (Jt. Exh. 5.)

Avery told Supervisor Beam that he was required to sign a last chance agreement. Beam said he did not know that Avery attended the arbitration because normally management sent him emails about the times Avery had arbitrations and grievance meetings. (Tr. 153.)

C. June 1, 2018: Avery Participates in a State Unemployment Compensation Hearing Involving Respondent's Terminated Employee

Avery's usual 15-minute morning break begins about 9 a.m. and lasts until 9:15 a.m. Employees do not clock out or clock in for breaks or lunches unless they leave the facility. The supervisors' offices are next to the break room and the supervisors normally take their breaks at the same time as the employees. (Tr. 480.)

On this day, Avery ran late and began his break about 9:12 a.m. (Tr. 44.) At 9:21 a.m., Avery received a call from a hearing officer with the Alabama Unemployment Office. The unemployment hearing officer stated he was calling Avery about a case involving a terminated fellow employee, Willie May. (Tr. 41.) The hearing officer asked whether Avery could sit in the meeting and Avery agreed to do so. (Tr. 42.) Avery denied expecting a call at that time. (Tr. 43.) Avery testified that he had not discussed with May previously whether he was going to be a witness, nor had he discussed acting as his representative. (Tr. 127.) He further testified he received no written notification from the unemployment compensation department about the call. However, because the unemployment office was a

[6] Respondent presented two documents, purporting that Avery emailed for time off for arbitration, albeit not a week's notice. However, one exhibit reflects Avery advising Respondent of extra time needed for witness preparation, and not the arbitration itself; the other, about a third step grievance meeting, involved no notification from Avery but instead was Berkes asking the names of the grievance committee members attending to secure the 1-week advanced notice. (R. Exhs. 2–3.)

government agency, Avery believed he had to cooperate with the call.

Avery walked outside to take the call. Although Avery remained on the call after his break time elapsed, he walked outside to his water truck and stayed outside the truck. He did not drive the truck. While the call took place, Avery testified without dispute that the plant was already watered down, and the grounds were wet. Avery had no trucks to load during that time. During the call, no slurry was running. At the time, no employees were required to wear respirators. (Tr. 404–405.)

During the telephonic unemployment hearing, HR Director Barry served as a witness for Respondent. Avery testified that his own hearing participation was limited to asking Barry a question and, towards the end of the hearing, stating that Respondent did not usually terminate employees for accidents. The hearing officer stated she could not use Avery's last point in the decision. (Tr. 44.) Barry said nothing to Avery during the hearing.

Once the call finished, Avery resumed work activities with the water truck. Although Avery's supervisor, Beam, was not present that day, his supervisor of the day was Joey Hemphill, who made no complaint about Avery to McCallum. (Tr. 383.)

Avery's portion of the unemployment call lasted 31 minutes, of which 25 minutes lapped into Avery's worktime.[7] After the call completed, Avery did not report the time to anyone because he thought it was work related, particularly with Barry on the line, and that he was required to respond when the government called.

After the unemployment hearing call concluded, Barry notified Berkes that Avery was on the unemployment hearing call and asked her to investigate whether he was present at work that day.[8] Barry did not direct Berkes on how to perform the investigation. Human Resources then directed McCallum to speak with Avery about the call and whether Avery alerted anyone about the call. (Tr. 397.)

On June 5, Production Manager McCallum spoke with Avery about his participation in the unemployment hearing. McCallum first approached Avery in this copy room and the discussion continued in McCallum's office. Other than Avery and McCallum, no one else was present for the conversation. (Tr. 51.) McCallum first asked Avery whether he was familiar with what happened on Friday. Avery was not sure what McCallum was talking about, then McCallum asked him about participating in the call and whether he let anyone know he was participating in the call. (Tr. 51.) Avery said he was on his break. Avery also showed the phone log to McCallum. Avery told McCallum that the call initially came in during his break and that he was not expecting the call. (Tr. 395–396.) McCallum said, "You were on your break?" Avery again said yes. McCallum said he was unaware of that and would notify Berkes.[9] McCallum testified that he had no reason to doubt Avery's representation that the call came in during break. (Tr. 395.)

On the following day, June 6, McCallum again spoke with Avery. (Tr. 52.) McCallum said he told "them" what Avery said and asked Avery to write a statement. Avery said he could not immediately because his shift was ending, but he would bring a statement the following day. McCallum agreed. As promised, at about 7:30 a.m. on June 7, Avery provided McCallum with this handwritten statement:

> On Friday June 1, 2018 while on my break I received a phone call at 9:21 a.m. from an Agent of the Unemployment Office. The call was in regards to Willie May filing for unemployment. The Agent said that Willie told him to call me. He then told me that he had Willie, Stacey Barry and someone else from the company who I don't recall her name on the other line waiting to be conferenced in for a hearing on the matter of Willie's unemployment. I assumed that I was supposed to participate being that Human Resources was involved and that I was called. I've never been involved in this before.

(GC Exh. 4.)

Avery told McCallum at one of the two meetings that he would be willing to have his pay docked for the telephone call. McCallum had the power to do change Avery's time but did not do so. During the meetings with McCallum, Avery did not act like he was hiding his actions.

Besides the unemployment action, May and Avery had a scheduled for a termination grievance meeting on June 7, 2018. (Tr. 58.) Respondent canceled that grievance meeting because it suspended Avery. (Tr. 58–59.)

D. June 7, 2018: Respondent Suspends Avery Pending Investigation

About 9 a.m. on June 7, Avery received a call from his supervisor to come to the office. When Avery arrived in the office, Shop Steward Lacey and Supervisor Beam were present. Beam stated Avery needed to go to McCallum's office and he probably should take Lacey with him. (Tr. 54.)

McCallum testified that the human resources department, person unknown, directed him to suspend Avery pending investigation. (Tr. 381.) When Avery and Lacey arrived in McCallum's office, McCallum stated that the company looked over "everything" and Avery's statements and intended to investigate further. McCallum told Avery he was suspended pending an investigation. (Tr. 55.) Avery told McCallum that he thought he was supposed to take that call and asked why he was suspended. McCallum said Avery performed union business on company

[7] This calculation is based upon the call time on Avery's cell phone. The record's math starts off "fuzzy," with Respondent implying Avery did not work for 40 minutes. That 40-minute period included break time, which is not working time. The transcript from the unemployment office shows that the call ended at 9:52 a.m., making the non-break time 25 minutes. (Tr. 131.) Respondent's position statement to the Board agent during investigation states that Avery was on the call until 9:52 a.m., 25 minutes after his break. (GC Exh. 7 at 4.)

[8] Berkes denied that Barry directed her to conduct an investigation and instead maintained that she started the investigation after Barry asked if Avery was off work during May's unemployment hearing. She also denied that Barry implied for her to start an investigation. (Tr. 444–445.)

[9] McCallum's testimony about his first two meetings with Avery were confusing as to dates and sounded rehearsed, without much detail. (Tr. 374.)

time.[10] Avery said he thought he was supposed to take the call and that Barry was on the line. (Tr. 56.) McCallum said he could see Avery's side. Avery clocked out and went home. (Tr. 56.)

Around 11:50 a.m. that same day, HR Manager Berkes called Avery and requested that he meet her in the regional office at 3 p.m. Avery, with Union President Jon Wilson, attended the meeting with Berkes and another person working in sales in the regional office's conference room. (Tr. 56–57.) They met for about 35 minutes.

Berkes asked Avery whether he knew about the call with the unemployment office ahead of time. Avery said no. Berkes also asked about Avery's communications with terminated employee May. Avery said May called him about 3 days before the telephonic hearing for some information about the equipment he ran and asked questions about his pending termination grievance. (Tr. 58.) Berkes also asked Avery if he was acting as a representative in the unemployment hearing, to which Avery said he did not know. (Tr. 59.)[11] Avery also testified he did not know whether he was a witness. Berkes asked how the unemployment office was able to contact him. Avery said Mays gave the officer his telephone number. (Tr. 59.) Berkes asked Avery whether he received anything in the mail that notified him about the hearing, to which he said he had not. Berkes wanted to know whether the unemployment office called him. Avery provided Berkes with a screenshot of the phone call via email (Tr. 60–61; GC Exh. 5.) The screenshot showed a 31-minute call.

Avery asked Berkes what all the questioning was about. Berkes stated that he took the phone call from the unemployment office, doing union business on company time. (Tr. 62.) Avery told her he thought he was supposed to take the call. Avery told her, "[I]f it was all about the time, then dock it, dock my time . . . ." (Tr. 62.) Berkes said it was too late and stated that his attendance at the January 2018 grievance arbitration was the same type of conduct.

Respondent maintained that it continued its investigation into Avery's participation in the unemployment hearing. During Respondent's direct examination, Barry testified to a number of leading questions that employees are not allowed to take personal breaks of 20 to 30 minutes. (Tr. 305.) If an employee finishes a task, an employee is supposed to help out in other areas.

Berkes testified that she took notes no notes of her interviews with Barry, McCallum and Avery. (Tr. 468–469.) Berkes developed a summary of the investigation, which apparently was an email. (Tr. 355, 468.) Respondent did not present the email, for reasons which are unknown.

Berkes reported her findings to Barry. Barry's summary of Berkes' report was that Avery did not have authorized approval to be away from work for the unemployment call. Barry could not recall if Berkes told him that Avery completed his work for the day. (Tr. 284.) Barry could not recall discussing Avery's job performance with Avery's direct supervisors before deciding to terminate him, nor could he recall Berkes reporting any such information. (Tr. 282–284.)

Berkes developed a summary, which was not presented at hearing. Before deciding to terminate Avery, Barry, apparently in a conference call, received input from a number of managers: Berkes; Gordinier; McCallum; Dan Brock, the vice-president of Human Resources; Grant Nintzel, the operations director for the region; and, Chris Burr, the in-house counsel. (Tr. 310.) McCallum confirmed he was on a call about Avery. McCallum could not recall who led the meeting, certain or specifics about who was on the call. He testified that he took no notes of the meeting, nor did he know who organized the meeting. (Tr. 376, 394.) McCallum testified that his understanding of why Avery was to be terminated was he was not working while on an unemployment call for 31 minutes, which he did not report or received prior approval to do, and then did not report it after the call to correct his time. Barry testified about the reasons for termination, except that he said that the call was unauthorized for 40 minutes. McCallum also recalled that they discussed Avery was a representative on the call and likely knew about it ahead of time. (Tr. 377.)

Barry testified that he made the ultimate decision to terminate Avery. Barry assumed Avery had advance notice of the call from the unemployment office. When Barry made his decision to terminate, he was not aware that Avery told Berkes he would be willing to have his pay docked for the time.

E. June 11, 2018: Respondent Terminates Avery

Berkes drafted the termination letter, which was reviewed by legal counsel and the vice-president of human resources. Berkes, in agreement with Barry's conclusion, decided that Avery had been notified by the unemployment office in sufficient time before the hearing to notify Respondent. Although the termination letter states that the call exceeded Avery's break and he never reported the non-working time to his supervisor, the letter also stated that the investigation indicated that, at the unemployment hearing, Avery was not a witness but was acting as May's representative.[12] Berkes testified that Avery failed to provide documentation of why he needed to be on the unemployment hearing call. Berkes testified Avery was participating in union business

[10] McCallum's testimony here lacked detail about the conversation. McCallum testified he told Avery that he was handling personal business on company time. In response to leading questions, he denied telling Avery that he was involved in personal business. (Tr. 375.) McCallum also testified that he did not consider union business to be work and instead union business was personal business when conducted on company time. (Tr. 393.) I therefore give little credence to McCallum's version and his denial.

[11] Avery at first testified he told Berkes that he was not May's representative and then changed the answer to that he did not know. (Tr. 59.)

[12] At hearing, Respondent relied upon the Employee Handbook provision for Time Reporting for Non-Exempt Employees: "All non-exempt Employees are required to record all hours they work. Time worked is all the time actually spent on the job performing assigned duties . . . ." It additionally states: "Misrepresenting working hours or tampering with the time clock or other Employees' time record are extremely serious offenses. Employees found to have engaged in any of these prohibited activities are subject to immediate discipline, up to and including termination of employment." (R. Exh. 5, p. 29; Tr. 104.) Respondent also relied upon the General Conduct and Safety Rules, which state that an employee could be immediately terminated for falsifying records. (Tr. 107–108, R. Exh. 7, p. 25–26.)

and should have notified Respondent 7 days before the hearing. This requirement is consistent with the Section 16.3 of the implemented terms and conditions. Berkes also testified that, she included in the letter that Avery stated he was not sure whether he was called as a witness or representative, but Respondent's investigation showed he was a representation, and he could have requested time off for union business. (Tr. 475–476.)

On June 11, Berkes contacted Avery and told him to report to her office in the regional offices. Besides Berkes and Avery, Union President Jon Wilson and Anastasia attended the meeting. (Tr. 65.) Berkes told Avery the company looked over everything and decided to terminate his employment. Berkes gave Avery his termination letter. Berkes told Avery that she hated to end this way and it had been nice working with him. (Tr. 65–66.)

The termination letter read, in relevant part:

> . . . Based on our investigation, it appears that you failed to properly notify your leadership of your intentions of participating in an unemployment hearing call on June 1, 2018 while still on work time. You admitted that you never made an effort prior to or immediately after the call to notify your supervisor that you never made an effort prior to or immediately after the call to notify your supervisor that you were on this call when you were supposed to be working.

Avery denied falsifying time records. Respondent's time records are kept biometrically by fingerprint. Avery testified he clocked in when he started work and clocked out at the end of the day. (Tr. 67.) No one clocks out from breaks or lunches except when leaving the premises. He denied violating the general conduct and safety rules provision of misrepresenting his work hours. (Tr. 156.)

Barry testified that the reasons for Avery's termination were listed in the termination letter. Berkes testified why she wrote certain sentences in the termination letter:

> A: [citing the letter, Jt. Exh. 6] "You claimed that you were not sure if you were called as a witness or a representative."
>
> Q: No, why did you write that sentence?
>
> A: Because that is exactly what he told me in the - - - in my investigation. And I asked him that because, as a representative, he could have requested the time off under union business.
>
> Q: Okay. Now the next sentence.
>
> A: "However, our investigation in a case that you are not sworn in as a witness, did not act as a witness [. . .] and instead acted as a representative for Willie May during hearing."
>
> Q: Now why did you write that sentence?
>
> A: Again, to say that if he was acting as a representative during the hearing, he should have requested the time off as union business, like he normally had.

(Tr. 475–477.) On recross-examination, Berkes confirmed that Avery needed to request union leave for the call. (Tr. 478.) Berkes testified that, instead of proceeding, Avery should have asked the hearing officer to wait for him to check with his supervisor at the end of his break before he continued with the call. (Tr. 480.)

At the time of this unemployment hearing, Respondent did not have a policy prohibiting employees from using their telephones for personal use during working time. (Tr. 148–149.) However, Avery denied that the call was a personal call. He testified that he thought he was supposed to take the call as it came from a government agency and could not refuse to participate. (Tr. 161.) Both Barry and Berkes testified that they were not aware of any policy prohibiting cooperation with a government call.

F. Respondent Receives the Transcript of the Unemployment Hearing

After Avery's termination, Respondent received the unemployment hearing transcript, which was certified on June 26. (R. Exh. 8.) Berkes denied requesting the transcript. (Tr. 446–447.) Barry did not know why he did not wait for the transcript before deciding to terminate Avery. (Tr. 356.)

The transcript's first page listed Avery as a claimant witness. The hearing officer called upon May first, before May was sworn in and before Barry was on the call. Upon questioning from the hearing officer, May stated that Avery would be appearing with him, should be on break about 9:15 a.m., and was his union steward. When the hearing officer asked whether Avery was a witness or representative, May said, "Well, uh, I guess rep, I guess . . . . 'Cause, because he's my union steward at the, at the job. Like I said, he's been trying to work with this thing, the reason I got fired." (R. Exh. 8 at 3.) The hearing officer asked May to confirm Avery's telephone number. When the hearing officer contacted Avery, the hearing officer asked whether Avery was "potentially going to be serving as a representative today." Avery answered, "Yes, sir. Yes, sir." (Tr. 128–129; R. Exh. 8 at 6.) The hearing officer identified Avery as May's union vice-president and representative. The unemployment hearing office later contacted Barry and swore in May and Barry. (R. Exh. 8 at 10–11.) Avery asked one question of Barry and none of May. Avery also made a statement on May's behalf. (R. Exh. 8 at 25–26.)

Barry stated that based upon the unemployment hearing transcript, he concluded that Avery had advanced notice of the unemployment hearing from May. (Tr. 354–355.) Berkes received the unemployment hearing transcript but did not read it in its entirety. She could only recall the first page where Avery was listed but seemed confused as to what was on the first page. (Tr. 476–477.) Berkes did not know whether the unemployment office had any form that representatives were required to complete. (Tr. 482.) Berkes testified that she has experience making entries of appearance at unemployment hearings. However, she did not know whether representatives were required to complete forms for the unemployment office. (Tr. 482.) She provided a phone number and, in her experience, one would be required to notify the unemployment office ahead of time to be able to participate. She had no recollection that Avery's phone number was at issue before the witnesses were sworn in. (Tr. 477–478.)

G. Respondent's Cell Phone and Break Memorandum to Employees

On November 20, 2018, after Avery's termination and subsequent labor board charge, Respondent issued a memorandum to all hourly employees. The memorandum was entitled

"Important Cellphone and Returning from Break Timely Memo." (GC Exh. 6.) The memorandum opened with this paragraph:

> In support of some recent labor charges, the Union has alleged that the Company does not uniformly enforce its guidelines and policies prohibiting the use of cellphones during working time and requiring employees to return to work from breaks in a timely manner. The company wants to make sure everyone fully understands expectations related to cellphone use at the plants and the need to follow break policies. In addition, the Company wants to make sure these guidelines and policies are enforced in a consistent manner.

(GC Exh. 6; Tr. 180–181.)

Barry testified that he investigated the unfair labor practices allegations, which included speaking with the plant and quarry managers. (Tr. 287.) At hearing, Barry maintained that everyone understood the guidelines and policies and the policies were uniformly applied; however, Barry initially testified the memo was "a refresher." (Tr. 288–290.) Upon later questioning whether Respondent relied upon unfair labor practice charges for "refreshers," Barry testified, "It depends. I don't know." (Tr. 328.) Barry also testified the earlier cell phone policy was not a policy but an unpublished guideline. (Tr. 300–301;[13] 329–331.)[14] Respondent's position statements, issued before November 2018, stated no cell phone policy existed. (Tr. 250–251; GC Exh. 8 at 7; GC Exh. 7 at 10.)

Despite the memo's intent, employees continued to use their cell phones for personal use. (Tr. 181.) Wilson testified that, even after the November 2018 memorandum, he took personal calls in front of his supervisors and received no discipline. To his knowledge, no employee received discipline for personal cell phone use during working time. (Tr. 182.) Barry testified that employees must obtain permission from their supervisors before engaging in personal business at work, but then testified that in Wilson's situation, it was an exception. (Tr. 329.)

H. Disparate Treatment Evidence

On many occasions, while working his slurry job, Avery received calls about union business from Berkes and Barry; he received pay for his job while taking these calls. Avery also was called to represent employees in meetings, without prior notification.

Avery and employee Jon Wilson[15] testified that they and other employees took personal phone calls outside of break time and never received discipline. (Tr. 66, 178.) A plant manager at the facility where Wilson worked told employees to limit time on personal calls. (Tr. 204.) Wilson further testified that he sometimes would need to work on a machine while talking on a cell phone, depending upon the circumstances. (Tr. 210–211.)

Respondent's policy at that time prohibited using personal cell phones when operating equipment. (Tr. 176.) McCallum testified that Respondent's cell phone policy is that employees could only use their personal cell phones for quick personal emergencies and cell phones should not be allowed in the plant area as a major safety risk. (Tr. 369.)[16] McCallum testified that he would just tell employees to get off the phone if he saw them.

McCallum testified that a temporary employee was released after "multiple offenses"[17] for being on the cell phone and not performing work, including sitting down in the bagging section and "surfing the web." He did not know how long the temporary employee was on the phone. (Tr. 390–391.)

Other than Avery and the unnamed temporary employee, Respondent issued no other discipline for cell phone use. (Tr. 253.) In January 2017, while driving a rubber tire loader, employee Cameron unbuckled his seat belt to answer his cell phone. The result was the loader stopped suddenly, with Cameron smacking his head into the windshield. (Tr. 251–252; GC Exh. 11.) Cameron had no previous discipline. (Tr. 303.) He received a 2-day suspension and a final written warning. Respondent issued to employees a reminder that, if talking on a cell phone while operating equipment, the phone should be in the "hands free" mode. Respondent also posted signed saying "hands free or stop." (Tr. 205.) Barry testified, to a leading question, that he was "not aware" that employees could use a hands-free mobile device while operating company equipment within a plant; however, if driving rental cars, employees were expected to use phones in a hands-free manner. (Tr. 303.)

Regarding returning to work after breaks, Wilson testified that employees did not need to obtain supervisory approval for an additional break or unscheduled break, as long as it did not interfere with the work. Barry testified that he was unaware of anyone receiving discipline for taking an unscheduled break without notifying the supervisor. (Tr. 339.) McCallum testified that he was not aware of anyone taking too long for breaks, nor anyone disciplined. (Tr. 397–398.) He further testified that the supervisor is usually in the breakroom at the same time as employees taking breaks because Supervisor Beam usually conducts a safety meeting before break. (Tr. 399.) Respondent presented no additional examples of employees who were terminated for taking extended breaks.

Respondent discussed one employee who received two last chance agreements. Employee Thomas incurred a last chance agreement on October 14, 2016. In his first last chance

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[13] Barry's initial testimony about the unpublished guideline was to leading questions and "just put into writing at that point. (Tr. 300–301.)

[14] McCallum also testified that he had not seen any written cell phone policy before November 2018. (Tr. 380.)

[15] Although Wilson works at different plant, his plant is part of the same bargaining unit and implemented terms and conditions of employment.

[16] McCallum also testified to what Beam said he told employees about the cell phone policy. McCallum was not present when Beam told employees about the cell phone policy. I now find that the statement is hearsay. McCallum was not present when Beam spoke to his employees and is submitted for the truth of what Beam did and told his employees, making the statement classic hearsay. Even if the hearsay is admissible, I cannot rely upon this self-serving statement as Respondent could have called Beam himself to testify about what he told employees.

[17] After testifying to "multiple incidents," McCallum then testified that the temporary employee was told to get off the phone once, and later was caught again. (Tr. 390.) I credit McCallum's admission of "multiple incidents" instead of the latter as McCallum appeared to be covering his tracks.

agreement Respondent documented that Thomas had a number of altercations involving verbal abusive and threatening language plus productivity issues. This last chance letter stated Thomas would be terminated immediately for a violation of the policies, rules, regulations or attendance policies, and "[n]o further allowance will be made . . . ." (Tr. 245–256; GC Exh. 9.) In the second last chance agreement, dated June 18, 2017, less than a year after Respondent gave Thomas the first last chance agreement, Respondent noted that Thomas falsified records on truck weights: The documents reflected the truck weights were beyond "the gross legal limit" and Thomas made the documentation appear to be within the correct legal limits. Further, the trucks were between 433 and 2853 pounds overweight. (GC Exh. 10.) The second last chance agreement was not limited to a 12-month period but for the duration of the employee's employment with Respondent but was limited to falsification of records. (Tr. 249; GC Exh. 10.) Other than Thomas, five others received confidential agreements, with similar language about falsely entering truck weights appear to be within the legal limits. Those letters threatened termination for any falsification of company records for the duration of their employment, but not for other violations. (GC Exh. 13.) Respondent maintained that it did not terminate Thomas in the second instance in which Thomas falsified records of truck weights because other employees and supervisors were involved in falsification of weights and because Thomas had outstanding EEO claims. Respondent had no examples of terminating employees for falsification of records in its Alabama facilities. (Tr. 326.)

IV. CREDIBILITY

A. General Counsel's Witnesses

Avery testified that he had a good understanding of the collective-bargaining agreement. He also demonstrated an adequate understanding of the attendance policy and that he knew he could be terminated for falsifying time records. (Tr. 78–79, 106; R. Exh. 1.) He testified consistently that he thought he was supposed to cooperate with the government call. I find credible Avery's statements that he had no written notice of the upcoming unemployment hearing. Certainly Respondent could have checked with the unemployment office or its third party representative for such information, but did not present any efforts to obtain any information other than receiving the transcript after the termination.[18] I therefore discredit Respondent's assumptions that Avery received a written notice before the unemployment hearing or that Avery had advance notice.

Avery credibly testified that, at the last-chance meeting in January 2018, when Avery attended an arbitration hearing without a 7-day notice to Respondent, Barry told him that the "higher ups" wanted him terminated. Barry, who attended the entire hearing, did not deny this statement during his testimony. This statement is an admission against interest, not an opinion protected by Section 8(c) as Respondent proposes, and I credit it fully.

Wilson testified as a current employee and is credited. He was forthright and testified before his employer. Respondent contends he should be discredited because Wilson never worked in the Montevallo plant and has no first-hand knowledge. (R. Br. at 21.) However, Wilson exhibited familiarity on the stand. With his special perspective as union president for a bargaining unit that includes Montevallo, I credit his testimony, particularly regarding Respondent's practices across the bargaining unit.

B. Respondent's Witnesses

I generally discredit the testimony of Respondent's witnesses unless it is an admission against interest or corroborated by other reliable evidence. Throughout the hearing, Respondent used leading questions for its witnesses during direct examination. A leading question is defined as one phrased in such a way as to hint at the answer the witness should give." *United States v. Cephus*, 684 F.3d 703, 707 (7th Cir. 2012) (cite omitted). Leading questions should not be used on direct examination except when the witness is called as a "hostile witness, an adverse party or a witness identified with an adverse party. . ." Fed. R. Evid. 611(c)(2).

Respondent relied upon a number of leading questions for Barry, particularly about the November 2018 cell phone policy publication. (Tr. 300.) I therefore give little weight to this testimony as Respondent's earlier position statement during the investigation of the charge reflects that no such policy existed. Barry testified that Avery was terminated for a 40-minute call, yet the termination letter correctly states he only was on the call for 31 minutes and some of that time was break time. Respondent's reliance upon the 40-minute time is also misleading because, crediting Avery's explanation of when he went to break, it fails to subtract the 6 minutes remaining in Avery's break. Respondent states a supervisor normally is in the break room when employees are taking their breaks and here provides no indication that a supervisor was not in the break room, much less that the investigation revealed anything different than Avery's explanation that he went to the break room at 9:12 a.m.

Barry also testified that nothing in the attendance policy supported a no-call/no-show was only valid for 1 year. (Tr. 306–307.) Barry also testified that the cell phone policy issued in response to the unfair labor practice charge was merely a "reminder," but was contradicted by Respondent's position statement, dated July 18, 2018, a month after Avery's termination: No cell phone policy existed. (GC Exh. 7 at 10.) Four months after Respondent provided this answer, it shifted to issuing its written policy "reminder." I therefore do not credit Respondent witnesses that a cell phone policy existed before November 2018.

McCallum's testimony was frequently generalized and sometimes incorrect. McCallum testified that the water truck duties were added to the job description for the slurry operator. However, this answer is inconsistent with the 2015 job description, which only states the slurry operator performs other duties as assigned. (R. Exh. 11; Tr. 401–402.) He shifted testimony about the temporary employee, who was terminated for "multiple incidents" and then backtracked to only two incidents. I therefore credit that the temporary employee incurred "multiple incidents"

[18] General Counsel contends that the portion of the transcript in which May was not sworn in is impermissible hearsay. I do not rely upon that portion for the truth of the matter asserted but to show Respondent's tardy reliance upon it.

before he was sent packing to the employment agency. He also generalized that employees were told to get off their cell phones if caught. General Counsel correctly points out McCallum provided no examples of who Respondent told to get off the phone. Again, Respondent did not call any supervisor who could provide examples or corroborate his testimony. I therefore find that McCallum's generalized testimony about telling employees to get off their phones has little, if any, weight.

McCallum first testified that he did not consider union business to be personal business, then testified that personal business during work hours is anything not work and included union business in the category of personal business. (Tr. 392–393.) McCallum weakly denied that he told Avery, during the suspension meeting, that he was suspended for conducting union business. Further, McCallum's denial is externally inconsistent with Berkes' admissions about the termination letter, in which she wrote a number of details because she believed Avery was conducting union business. I credit Avery's detailed discussion that McCallum told him he was suspended because he was on union business.

A significant amount of Berkes' direct examination testimony was to leading questions. General Counsel objected repeatedly to the leading questions Respondent posed to Berkes, who was not a hostile witness or adverse party. The record does not establish that these answers related to undisputed preliminary matters or that Berkes' memory was exhausted. Because a number of these questions stated the answer and Berkes answered before an objection could be lodged or before I could rule on the objection, the answers are entitled to "minimal weight." *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 (Feb. 8, 2019) fn. 1 (2019).

In one example, Berkes testified to the following:

> Q: On June 1, 2018, did Avery participate in a telephone conference regarding Willie May's unemployment:
>
> A: Yes.
>
> Q. And did you receive an email with a screenshot of that telephone call?
>
> A. Yes.
>
> Q: And did that screen shot indicate that the telephone call lasted 31 minutes?
>
> A: Yes.
>
> Q: Do you understand Avery's break time to be between 9 to 9:15?
>
> General Counsel objects as leading.
>
> Judge: If you know. What are -----
>
> A: Yes---9 to 9:15.

(Tr. 427–428.)

In another instance Respondent questioned Berkes about break times and what time the unemployment call started, but did not ask whether Berkes knew what time the call ended. Respondent then asked:

> Q. So if my math is correct - - - and I'm not a mathematician but this one seems pretty easy---it seems like the time from 9:12 to 9:52 which is when the telephone call would've ended is 40 minutes; is that right?
>
> A: Yes.

(Tr. 428.)

In this example Berkes merely capitulated to the proposition presented by Respondent's counsel, which was leading and conclusionary. I therefore cannot credit it. *Ajax Tool Works, Inc.*, 257 NLRB 825, 826 fn. 2 (1981) enfd. 713 F.2d 1307 (7th Cir. 1983); *Sheet Metal Workers Local 20*, 253 NLRB 166, 168 (1980). Also see: *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 15 fn. 16 (2019) (testimony to direct questions that have broad hints and suggestions about answers or answers are not credible); *Woodline Motor Freight, Inc.*, 305 NLRB 6 (1991), affd. 972 F.2d 222 (8th Cir. 1992).

Berkes denied that Respondent's clock in/clock out policy was limited to when employees leave the facility. Then she hedged: "It's not only, I guess." (Tr. 448.) The policy actually limits clocking out when an employee leaves the facility. (Tr. 449–450; R. Exh. 5 at 29.)

Berkes also testified that she participated in the telephone conference call in which Respondent determined to terminate Avery. However, Berkes could not recall if the group discussed whether Avery was serving as a union representative or as a witness in the employment hearing; she then denied that that the group considered Avery's role in deciding to terminate him. (Tr. 452–453.) McCallum also testified vaguely about the meeting and took no notes. He could not recall who attended the meeting. Berkes' own testimony about Avery's termination letter undermines those contentions.

Berkes admitted drafting the termination letter, which cites Avery's role in the unemployment hearing. (Tr. 453.) Berkes' testimony indicates that at a number of junctures in the letter, Respondent considered Avery's activity in the hearing was union activity. (Tr. 475–478.) Therefore, it is difficult to believe Berkes' testimony that the group meeting did not consider Avery's role at the unemployment hearing.

In addition, Berkes' admissions about the information included in the termination letter are externally inconsistent with Barry's testimony about Avery's role in the unemployment hearing. Berkes admits that she included the statements due to Avery's union activity, but Barry testified Avery's role in the hearing, whether as a witness or representative, made no difference. Barry's testimony therefore is not credited as to the significance of Avery's role in the hearing.

Lastly, Respondent did not explain why it did not call two potentially favorable witnesses, which may create an adverse inference. *Michael Cetta, Inc. d/b/a Sparks Rest.*, 366 NLRB No. 97, slip op. at 9–10 (May 24, 2018). Respondent did not call Supervisor Beam to testify about practices in his area. Nor did Respondent call Supervisor Hemphill as a witness to when Avery was at break on the day of the unemployment hearing. As discussed further in the Analysis section, several adverse inferences arise from these failures.

V. ANALYSIS

This section will explore whether Respondent unlawfully terminated Avery under different theories. I first examine the alleged disciplinary actions for protected concerted activity and union activities with shifting burdens of proof. I conclude with examination of whether Respondent applied Section 16.3 of the applied terms and conditions to Avery in an overly broad manner.

A. Wright Line Applies to the Suspension and Termination Allegedly Due to Protected Concerted Activity and Union Activity

1. Applicable law

Much of this case turns on whether Respondent had an unlawful motive to take the actions described above. In mixed-motive situations for both protected concerted activity cases under Section 8(a)(1) and those arising for possible antiunion animus under Section 8(a)(3), the standard applied is found in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Also see *Tortillas Don Chavas*, 361 NLRB 101 (2014) and *Signature Flight Support*, 333 NLRB 1250 (2001). Under this framework, General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that the employee's protected concerted activity or union activity was a substantial or motivating factor in taking the adverse employment action, i.e., that a causal relationship existed between that activity and the adverse action. This inquiry includes establishing that the employee engaged in protected concerted and/or union activity, that the employer knew or suspected it, and that the employer had animus against such activity. If General Counsel makes a sufficient showing of causation, the burden shifts to the employer to establish by a preponderance of the evidence that even absent the protected concerted activity or union activity. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 5–8 (2019).[19]

An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996); *T & J Trucking* Co., 316 NLRB 771 (1995). If the employer's reasons are found to be pretextual—reasons that are false or not in fact relied upon—the employer fails to sustain its burden and the inquiry is terminated. See, e.g., *Lucky Cab Co*., 360 NLRB 271, 275–276 (2014) ("finding of pretext defeats an employer's attempt to meet its rebuttal burden"); *Servicios Sanitarios De Puerto Rico d/b/a A-1 Portable Toilet Servs.*, 321 NLRB 800, 804 (1996); *Caruso & Ciresi, Inc*., 269 NLRB 265, 268 (1984). When pretext is found to be the case, dual motive no longer exists. *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002).

2. Protected concerted activity and union activity

In assessing whether Avery was terminated for protected concerted activity, I first explore whether the activity was concerted and protected. I examine whether Respondent had knowledge and animus. Finding that General Counsel presented a prima facie case, I then explore whether Respondent meets in burden to rebut General Counsel's prima facie case.

a. Avery's participation in the unemployment hearing was protected concerted activity

i. General principles of protected concerted activity

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 protects the right of employees to "seek to improve working conditions through resort to . . . channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978).

Activity is "concerted" if it is engaged in with or on behalf of other employees, and not solely by and on behalf of the employee. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. See also *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003); and *Whittaker Corp.*, 289 NLRB 933 (1988). Notably, the requirement that activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. Inasmuch as almost any concerted activity for mutual aid or protection starts with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

In examining the matter before us, I first discuss whether a former employee is an employee under the Act. Finding that the former employee is an employee, I next discuss that employee involvement in an unemployment hearing is a protected concerted activity.

ii. Status of the former employee

A former employee involved in a dispute relating to former employment remains an employee pursuant to Section 2(3) of the Act. *MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino*, 365 NLRB No. 76, slip op. at 1 fn. 1 (2017);[20]

[19] General Counsel and the Union suggest that an alternative route is found in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The standard, in part, requires finding of employer's good faith and a showing that misconduct never occurred. Because Respondent relies upon a number of reasons for terminating Avery and I do not find that Respondent's reasons are based upon good faith, I do not analyze the facts under *Burnup & Sims.*

[20] Chairman Miscimarra concurred that the former employee remained an employee as defined in the Act. *Grand Sierra*, supra, slip op.

Andronaco Industries, Inc., 364 NLRB 1887, 1898 (2016) and cases cited therein. Section 2(3) defines an employee as

> [A]ny employee, and shall not be limited to employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . .

The principle that "members of the working class generally" are statutory employees is not a novel one. *Thomas Steel Co.*, 281 NLRB 389, 392 (1986); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 and fn. 4 (1977), citing *Briggs Mfg Co.,* 75 NLRB 569, 570, 571 (1947) and in accord with *Oak Apparel, Inc.,* 218 NLRB 701 (1975). The purposes of the "broad definition" include promoting freedom of association, as stated in Section 1 of the Act, and mutual aid and protection in Section 7 of the Act. Ellen Dannin, *Not a Limited, Confined or Private Matter --- Who is an "Employee" Under the National Labor Relations Act,* 59 LAB. LAW J. Vol. 1, available in Westlaw, 2008 WL 10920315 (March 2008). May, the former employee, remained an employee as defined because he had a labor dispute over unemployment compensation, which relates to one's employment and is an aspect of national labor policy. *Supreme Optical Co., Inc.*, 235 NLRB 1432, 1432 (1978), enfd. 628 F.2d 1262 (6th Cir. 1980), cert. denied 451 U.S. 937 (1981).[21]

iii. Participation in an unemployment hearing is protected concerted activity

"Employees are not protected merely for activities within the scope of their employment relationship and may engage in other activities for mutual aid or protection." *Andronaco Industries*, 364 NLRB 1887, at 1898. The "mutual aid or protection" portion of Section 7 permits employees to improve working conditions by seeking assistance through administrative channels. *Eastex*, supra. Unemployment hearings are included in those administrative channels.

Participation in unemployment hearings on behalf of a terminated employee is a concerted activity. *M K Laboratories, Inc.*, 261 NLRB 152, 158 (1982). The Board reiterated, "'[I]t is traditional for employees to help each other and make common cause so that each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping.'" *Supreme Optical*, 235 NLRB at 1433, citing *Washington Forge, Inc.*, 188 NLRB 90, 97 (1971). In *NLRB v. Faulkner Hospital*, 691 F.2d 51, 54–55 (1st Cir. 1982), enfg. 259 NLRB 364 (1981), an on-duty guard, without leaving his post, gave a statement to a terminated employee for use in an unemployment compensation hearing, which was protected concerted activity.

Here, former employee May reached out to Avery, a fellow employee, through the governmental office, to assist with the unemployment hearing. Avery's presence in the telephonic hearing is lawful protected concerted activity in support of a former employee.

b. Knowledge

McCallum testified that Avery was known to be a strong advocate on behalf of the Union. Barry and Berkes had numerous dealings with Avery, including negotiations, arbitrations and grievances.

For this particular call, knowledge of the protected concerted activity and union activity are evident and undisputed. Barry was on the unemployment hearing call when Avery appeared on behalf of May. Berkes and McCallum both, stated Avery was involved in union activity on the call.

c. Animus

Proof of animus and discriminatory motivation may be based upon direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428–1429 (11th Cir. 1985). Regarding direct evidence, Berkes admitted she drafted portions of the termination letter because Respondent believed Avery engaged in union activity. The credited evidence also finds McCallum told Avery that he was suspended due to his union activity. These statements alone are "independently sufficient to demonstrate unlawful discrimination." See *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 4 (2018), enfd. 774 Fed. Appx. 4 (D.C. Cir. 2019) (respondent employer's statements and actions reveal true reasons). However, additional factors demonstrate animus.

This situation is unusual because direct evidence is available. As Respondent presents additional defenses and because direct evidence of unlawful motivation is seldom available, General Counsel may rely upon circumstantial evidence to meet the burden. See *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Factors supporting an inference of antiunion motivation include employer hostility towards unionization, timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify adverse action and deviations from past practice. *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 16 (2019). A number of these factors examined here.

i. Expressions of hostility towards union activities

Certain expressions can support a finding of animus. *Advanced Masonry Associates, LLC v. NLRB*, 781 Fed. Appx. 946 (11th Cir. 2019), enfg. 366 NLRB No. 57 (2018) and 366 NLRB No. 164 (2018). In addition to the direct statements as evidence of animus found above, Berkes also verbalized to Avery that he engaged in the same conduct as when he attended the January 2018 arbitration hearing, which implies that he was engaged in union activity. With the January 2018 discipline, Barry undisputedly told Avery that the "higher ups" wanted him terminated for the contractual violation. These statements indicate more animus.

ii. Evidence of animus outside the 10(b) period

Respondent contends that the its disciplinary actions, occurring before termination, cannot be considered because they are

at 3 and fn. 2, citing *Briggs Mfg. Co.,* 75 NLRB 569, 570–571 (1947) and *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).

[21] The Sixth Circuit found that this situation, in which the employer gave permission for employees to attend the unemployment hearing and rescinded permission after they attended, "had a sufficiently close nexus to the terms and conditions of employment to be 'protected concerted activity.'" *Supreme Optical Co., Inc. v. NLRB*, 628 F.2d at 1263.

new allegations and barred by Section 10(b). (R. Br. 14, fn. 12.) On the contrary: Actions that do not violate the Act, although not independently alleged, may be used to establish union animus. *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993). Incidents that occur before the 6-month 10(b) period may still serve as evidence of animus. *SCA Tissue North Am., LLC*, 338 NLRB 1130, 1135–1136 (2003), enfd. 371 F.3d 983 (7th Cir. 2004); *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003).

One instance is that both Avery and Wilson discussed Barry's statements about filing a charge, which is general proof of animus. However, more specifically, Barry's admission against interest that the "higher ups" wanted Avery terminated in January 2018 also demonstrates animus.

iii. Incomplete investigation

A "truncated" investigation provides evidence of unlawful animus. *Mondelez Global, LLC*, 368 NLRB No. 46, slip op. at 2 (2020). Respondent contends it did not have an obligation to investigate Avery's actions and it would not have resulted in a different outcome. (R. Br. at 16.) Factually Respondent admittedly did not know whether Avery was not at work while taking the governmental call and used that as a springboard for the remainder of its actions.

Respondent's lack of documentation of its investigation is questionable. Neither Berkes nor McCallum took notes. Berkes prepared a summary, which was not presented at hearing. It did not have the unemployment hearing transcript in hand before it decided to terminate Avery, yet relied upon that information at hearing. Additionally, "Human Resources" directed McCallum to determine whether Avery alerted anyone about the call ahead of time. McCallum and Berkes only spoke with Avery and did not check with any supervisors. None of the participants in the group management call allegedly took any notes. Only Respondent's termination letter conveniently represents Respondent's findings in the investigation; even then, Berkes's testimony was needed to explain Respondent's rationale for terminating Avery.

Respondent admits that it failed to question supervisors during the investigation itself, which shows an incomplete investigation. First, Respondent never questioned Supervisor Hemphill about Avery's break that morning and whether his break affected his work. *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 23 (2019) (failure to question supervisor who could exonerate employee shows lack of concern about investigation). Secondly, Respondent never questioned Supervisor Beam at hearing about the break and cell phone practices in his area and instead relied upon hearsay evidence. Failure to call these supervisors to testify to such matters creates an adverse inference that they would testify contrary to Respondent's position.

Presuming evidence of misconduct does not render Respondent's actions lawful. *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989); *Champion Parts Rebuilders, Inc., Northeast Div.*, 260 NLRB 731 fn. 1 (1982), enfd. in rel. part, 717 F.2d 845 (3d Cir. 1983).[22] Respondent's investigation assumed that Avery received some written notice about the unemployment hearing. It also presumed that Avery had some notice about when he would receive a call from the unemployment office. None of these assumptions are supported in the record. Respondent also relies upon the unemployment hearing transcript to show that Avery had knowledge of the upcoming call. The section it relies upon is before Barry and Respondent's representative were included in the telephonic unemployment hearing. (R. Exh. 8 at 2–4.) Because Respondent did not have the transcript when it terminated Avery, it does not prove it knew about May's statements about Avery's involvement or could have relied upon this information when it terminated Avery. Berkes admitted she did not read the entire transcript even when she received it. As Respondent relies upon information that was unavailable prior to discharge, it cannot rely upon it now to justify its actions at that time.[23] As Respondent's actions are based upon speculation, I find them unreliable. *J-H Rutter-Rex Mfg. Co.*, 206 NLRB 656 fn. 2 (1973) (not crediting speculations).

Respondent admittedly relied upon Section 16.3 of the implemented terms and conditions that Avery had to give previous written notice to Respondent. However, the plain meaning of that section is specific to what is included. It does not include a protected concerted activity like participation in unemployment hearings on behalf of a terminated employee. When Respondent investigates alleged misconduct, it cannot change the implemented terms and conditions to suit its needs. Respondent mistakenly relied upon Section 16.3 to warrant Avery's suspension and termination.

iv. Shifting explanations

Respondent shifted regarding how long Avery was involved in the unemployment call and its application of the cell phone policy.

Respondent shifted explanations about why the first no call/no show discipline did not fall off Avery's disciplinary record after 1 year. The disciplinary process in the attendance policy offers termination when the employee incurs another half or full occurrence in a 12-month period. Although Avery did not incur another point for over a year after his 2017 no call/no show, over a year later Respondent required Avery to sign a last chance agreement in order to retain his job or face "voluntary resignation." It did not allow the prior discipline to "fall off" after 1 year, as the absenteeism policy dictates. Respondent did not present any information that shows it administered its absenteeism policy in such a way that it did not make exceptions.

Respondent contends that Avery went to break at 9 a.m. and therefore spent 37 minutes on the call. (R. Br. at 7.) Later, citing the termination letter, Respondent maintains Avery should have been working for 30 minutes. McCallum testified that one of the reasons for terminating Avery, discussed in the call apparently, was that Avery was in a personal call for 31 minutes. The time

[22] Also see *Continental Radiator Corp.*, 283 NLRB 234, 250 and fn. 35 (1987) (not bothering to warn employee is evidence of unlawful motive).

[23] General Counsel argues that the portion of the unemployment hearing transcript before the witnesses were sworn in is hearsay, making it unreliable and inadmissible. I agree the transcript cannot be used for hearsay purposes. That portion of the transcript is relevant and admissible only to the extent that it demonstrates Respondent's belated reliance upon the transcript for its disciplinary actions against Avery.

of 31 minutes matches the amount of time of the call listed on Avery's phone; however, it does not account for time during which Avery was on break. As noted above, Respondent provided no supervisor testimony to contradict Avery's testimony about when he went to break, and I credited Avery's statement that he went on break at 9:12 a.m. According to McCallum's testimony and parts of Respondent's brief, Respondent relied upon the incorrect amount of time Avery was not working. Respondent therefore shifts the amount of time Avery spent on the call. Also, of import here was that McCallum admitted he could have changed Avery's time but declined to do so.

Respondent further contends that Avery violated its cell phone policy. Its position paper, however, denied the existence of a cell phone policy. It belatedly issues a written cell phone policy approximately 5 months after Avery's discharge and in response "to unfair labor practice charges." Such action is closing the barn door after the cows are out to pasture and demonstrates Respondent's shifting positions.

v. Timing

Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Bros., Inc*., 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co*., 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appeared suspect). Timing here is undeniable: Respondent started the investigation into Avery's conduct based upon his attendance in the unemployment hearing, believing he was engaged in union activity and knowing he was representing an employee. When on the telephone line with Avery, Barry did not ask whether Avery was at work.

vi. Disparate treatment

Respondent maintains no evidence of disparate treatment exists. For example, Respondent argues it did not discipline employee Wilson, who is currently the union president. "[A]n employer's failure to take adverse action against all union supporters, or employees who engaged in other protected activity, does not disprove discriminatory motive, otherwise established, for its adverse action against a particular employee." *Tito Contractors*, 366 NLRB No. 47, slip op. at 22, citing: *NLRB v. Nabors*, 196 NLRB F.2d 272, 276 (5th Cir. 1952); *Volair Contractors, Inc*., 341 NLRB 673, 676 fn. 17 (2004); *Master Security Services*, 270 NLRB 543, 552 (1984). Thus, Respondent's restraint towards Wilson does not translate into a lack of animus. Several other instances point to disparate treatment.

For one, Respondent relies upon McCallum's testimony that Respondent returned a temporary employee. McCallum's credited testimony reflects "multiple offenses" of cell phone use during working time, including surfing the web. Therefore, presuming that the temporary employee was returned due to multiple offenses of cell phone use, Respondent comparatively terminated Avery for a single incident. The temporary employee was given more chances than Avery and McCallum did not know how long the temporary employee was using his cell phone. Respondent therefore treated the union vice president talking with a government agency more stringently than a temporary employee. *Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532, 1549 (2015), enfd. 689 Fed. Appx. 639 (D.C. Cir. 2016) (others violated safety rules but not disciplined similarly to union adherent). When an employer is otherwise lax about enforcement and targets a union supporter, such as Avery, the employer has not neutrally applied its disciplinary rules. *Advanced Masonry Associates v. NLRB*, 781 Fed. Appx. at 959.

Disparate enforcement of a policy also demonstrates animus. *Mountain View Care and Rehabilitation Center, LLC*, 368 NLRB No. 128, slip op. at 1 fn. 1 (2019). Respondent suspended employee Cameron after an accident in which Cameron unbuckled his seat belt to reach for his personal cell phone while operating a loader. However, General Counsel correctly points out that Cameron's discipline was not for using the cell phone per se, but for using the cell phone while operating equipment. (GC Br. at 12–13.)

Further, if the cell phone policy existed when Cameron received discipline, as Respondent maintains, it failed to rely upon it to give Cameron discipline. Instead it posted signs that employees were permitted to use cell phones while operating equipment as long as it was "hands free." Now it applies the requirement to Avery. As Respondent's admits the alleged "refresher" on cell phones was due to the unfair labor practice charges, I find, in combination with the treatment of Cameron and no other disciplinary actions, that Respondent disparately relies upon a cell phone policy that did not exist at the time of Avery's discharge.

An additional factor in the cell phone discipline is that when he saw employees on the phone, McCallum generally stated he told them to get off the phone, without discipline. Respondent does not demonstrate how long these employees were on the phone when McCallum caught them. Barry instead permitted Avery to continue on the call without asking whether he was off work, then instructed Berkes to find out that information.

Respondent contends that it does not show animus when compared to employee Thomas, who was on a last chance agreement for poor production and other problems when it issued a second last chance warning for falsification of information about weights for trucks. Respondent excuses its failure to terminate Thomas for the falsification of truck weights because he filed numerous EEOC charges and supervisors also had falsified weights. This situation is differentiated from *T.V. Cable of Savannah*, 218 NLRB 838, 840 (1975): The complaint there was dismissed because the employer consistently terminated employees for falsifications of records, compared to here, where Respondent did not.

Respondent also argues that Avery violated more rules than Thomas. However, the comparison is not accurate: Respondent's reasoning omits what it admitted in the letter to Thomas and the others: The weights the employees falsified went beyond the "legal" limits. Falsification of truck weight documentation not only violates Respondent's code of conduct, it also violates reporting requirements for truck weights under state and possibly federal statutes. See, e.g.: 23 USC § 127 regarding vehicle weight limitations on interstate highways; Ala. Code § 32-9-20(a)(4) (1975), describing state weight limitations. Thomas

violated the legal documentation requirements at least twice. (GC Exh. 10; compare GC Exh. 13.)

With Thomas and the supervisors, Respondent gave lesser discipline for conduct unlawful under state and/or federal statutes. Because these offenses violated both Respondent's code of conduct and were unlawful, Thomas's conduct was more grievous than Avery's, yet Respondent chose to suspend and terminate Avery. In this light, Respondent disparately treated Avery.

d. Pretext

Respondent must show it would have taken the same action for legitimate reasons even in the absence of protected activity. *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 17. ". . . [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). When pretext is found, dual motive no longer exists. *La Gloria Oil*, 337 NLRB at 1124. When General Counsel makes a strong showing of discriminatory motive, Respondent's rebuttal burden "is substantial." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011), enfg. 355 NLRB 1319 (2010).

General Counsel made a strong showing of discriminatory motive with direct and circumstantial evidence. A number of factors discussed as animus also demonstrate that Respondent's reasons are pretextual. An employer does not prove a *Wright Line* defense when the terminated employee has a clean record and long tenure with the employer but treats other employees with similar violations or worse with more leniency. *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990–991 (2004). Until 2017, Avery had a clean record. Despite its own policies, Respondent carried over the 2017 no-show discipline past 1 year and issued a last chance agreement. Thomas, who did not have a clean record when he falsified weight records, was treated more leniently by giving him an additional chance. Respondent disparately treated Avery regarding falsification of records. Respondent's lax treatment of Thomas and others are particularly compelling compared to the unlawful falsifications of truck weight records. Respondent's treatment and failure to give "clear, consistent and credible explanation for discipline supports a finding of pretext." *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 565–566 (6th Cir. 2019) (internal quotes and cites omitted), enfg. 366 NLRB No. 104 (2018) and cases cited therein.

"[L]ack of an objective and complete investigation is circumstantial evidence of pretext." *St. Paul Park Refining Co., LLC. d/b/a Western Refining*, 366 NLRB No. 83, (2018), enfd. 929 F.3d 610 reh'g and reh'gen banc denied (8th Cir. 2019) (citing *Woodlands Health* Center, 325 NLRB 351, 364–365 (1998) and *Sheraton Hotel Waterbury*, 312 NLRB 304, 322 (1993)). As described above, the investigation was incomplete and serves as evidence of pretext.

Shifting explanations for Respondent's actions are strong evidence that Respondent's asserted reasons are pretextual. *Roemer Industries,* supra; also see *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 44 (1st Cir. 2004), enfg. 339 NLRB 262 (2003) (shifting explanations for discharge may serve to ground or reinforce a finding of pretext). Respondent's explanations at hearing for much of the termination letter are not about falsification of time records, but about performing perceived union activities after his break time. In other words, they "furnished the excuse rather than the reason for the discharge." *SCA Tissue*, 371 F.3d 991–992 (internal quotation marks and citation omitted). In these circumstances, Respondent cannot rely upon the violation of the falsification of time records when it is a pretext to discipline Avery for his union and protected concerted activities. *Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987).

The lack of a cell phone policy at the time of Avery's suspension and discharge is problematic for Respondent's rebuttal burden and actually weakens its argument. *Bally's Park Place, Inc.*, 646 F.3d at 936, citing *Ross Stores Inc. v. NLRB*, 235 F.3d 669, 675 (D.C. Cir. 2001). While having a written rule is not required, Respondent's reliance upon a cell phone policy before November 2018 is suspect for the reasons discussed above. *NLRB v. Spotlight Co.*, 440 F.2d 928, 933 (8th Cir. 1971), enfg. in rel. part 181 NLRB 641 (1970).

These explanations show that the reasons given for Respondent's actions are pretextual and Respondent did not meet its substantial rebuttal burden. Respondent fails to show it would have taken the same action for the reasons, absent the protected conduct. The next portion of the *Wright Line* analysis is unnecessary. *Flex-N-Gate Texas, LLC*, 358 NLRB 622, 633 (2012); *La Gloria*, supra.

3. Conclusion regarding protected concerted activity and alleged 8(a)(1) violation

Section 8(a)(1) is violated when an employer disciplines or discharges and employee because the employee is engaged in, or believed to have engaged in, concerted activity for the purpose of mutual aid or protection. *Marburn Academy, Inc.*, 368 NLRB No. 38, slip op. at 10 (2019). The employee's protected conduct does not need to be the sole motivating factor, only "a substantial or motivating factor." *Adams & Associates, Inc. v. NLRB*, 871 F.3d 358, 370 (5th Cir. 2017). The right of an employee to attend an unemployment hearing is balanced against the employer's interest in efficiently operating the business. *M K Laboratories*, 261 NLRB at 158, citing *Supreme Optical*, supra, at fn. 9. Respondent suspended and disciplined Avery with knowledge of his participation in the unemployment hearing. Avery's participation in the call is protected concerted activity. Respondent acted because of Avery's participation. Avery does not deny that he spent some time after his break on the call. As shown above, Respondent's actions and explanations demonstrate animus as well as pretext.

General Counsel has demonstrated the elements of protected concerted activity and Respondent's knowledge. The record supports a finding of animus for a number of reasons. Many of the factors supporting animus also support a finding of pretext. *Cordua*, supra, slip op. at 24. Similarly, in *NLRB v. Faulkner Hospital*, 691 F.2d at 56, the employer terminated the guard for a number of stated reasons, which included leaving his post without authorization to do so while giving a statement for an unemployment hearing. The evidence showed, however, that other guards left duty stations for personal matters longer than the 8–10 minutes in which the terminated guard remained at his post

and the other guards were not disciplined or terminated. Id;[24] see also *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO v. NLRB*, 127 F.3d 1300, 1308 (11th Cir. 1997), enfg. in rel. part sub nom. *H.B. Zachry Co*., 319 NLRB 967 (1995) (treating union supporter disparately for breaks). Here, Avery was at his post. Wilson and Avery testified about break times and increased allotments for breaks. Because Respondent did not question the supervisors about Avery's break or whether he was at his post, Avery's testimony is uncontradicted. Respondent does not demonstrate that Avery's participation affected production. In particular, Respondent did not present the supervisor who would have known whether Avery was supposed to be working on certain projects. *M K Laboratories*, supra. I find that Respondent treated Avery differently for this particular break because he was engaged in protected concerted activity during an unemployment hearing.

Respondent relies heavily upon *Vokas Provision Co. v. NLRB*, 796 F.2d 864 (6th Cir. 1986). However, that case is differentiated upon its facts. The employer was charged, inter alia, with a Section 8(a)(3) violation after it terminated 6 employees who wanted to attend a representation case hearing pre-conference. The employer employed 12 employees. The 6 employees had expectations of receiving subpoenas at the hearing the following day but did not have them at the time they advised the employer. The employer asked to see the subpoenas before excusing the employees. Because no employee had a subpoena in hand, the employer stated it would allow one employee to attend as a representative but could not allow all 6 to attend without subpoenas. On the morning of the pre-conference, the employer reiterated his request and told the 6 employees that he would terminate them for insubordination if they left without presenting the subpoenas. Id. at 866–867. The employer terminated the employees. The court stated the employer did not violate Section 8(a)(3) because the meeting was an informal conference at which attendance was not required. Id. at 871. Citing *NLRB v. Mylan-Sparta Co.*, 166 F.2d 485, 491 (6th Cir. 1948), the court further noted that the employees' attendance was not shown to be necessary, advisable or that the information could not have been obtained either through correspondence or telephone conversation. *Vokas*, 796 F.2d at 871.

Vokas is distinguished on a number of levels. Avery absented himself from work for 25 minutes as opposed to an entire day. Additionally, Avery's actions are not similar to the 50 percent of the work force in *Vokas* that took off for an entire day: In *Vokas*, half the work force leaving would have a significant effect upon an employer's interest in operating the business efficiently. Respondent provides no proof that Avery's actions actually affected his working duties that day and instead surmises what Avery could have been doing in that time. Thirdly, Avery's call was a direct request from a government agency whether he could participate on behalf of employee May. Lastly, the court in *Vokas* stated that the information or attendance could not have been obtained through correspondence or a telephone conversation. Avery participated by telephone, which is what *Vokas* prescribed.

Avery's participation in protected concerted activity on the phone unemployment hearing is a reason on which Respondent determined to suspend and discipline him. Therefore, I find that Respondent violated Section 8(a)(1) when it suspended and discharged Avery for his participation in the unemployment hearing call.

4. Conclusion regarding union activity and alleged 8(a)(3) violation

An employer may discipline pro-union employees or other engaged in protected activities so long as the employer has not engaged in the conduct with anti-union animus. *E.C. Waste, Inc*, 359 F.3d at 41–42. In addition to the circumstantial evidence, animus is strongly established by Berkes' admissions against interests that Avery was engaged in union activity and reinforced with disparate treatment and pretext. McCallum's statement that he was suspended for union activity also demonstrates animus. Disparate enforcement of policies, even presuming they exist, demonstrate animus. *Mountain View Care Center*, supra.

The situation is similar to *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 826–287 (7th Cir. 2005), enfg. 341 NLRB 761 (2004). There the employer terminated an employee for falsification of a preventive maintenance report. Like here, the employee admitted to the alleged violation. Like here, the employee was a leading union activist and the employer had knowledge of his activities. Like here, the employer never terminated anyone for falsification of a report. Indeed, it appears that here, like in *Ryder*, the supervisors were complicit in falsification of records. To paraphrase the court, Respondent used Avery's actions as an excuse rather than the actual reason. 401 F.3d at 837. Respondent therefore violated Section 8(a)(3) and (1) by suspended and terminated Avery.

B. Respondent's Use of Section 16.3 to Avery's Suspension and Termination

1. Applicable law

An employer violates Section 8(a)(1) if it maintains workplaces rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If an employer applies a rule to restrict the exercise of Section 7 rights, the application of the rule violates Section 8(a)(1) of the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 fn. 4 (2004) (in third prong of test, disparate enforcement of rule against union or other protected concerted activity violates the Act). Any ambiguity in the rules must be construed against the drafter. *T-Mobile USA*, 369 NLRB No. 50, slip op. at 14 (2020).

2. Respondent overbroadly applied Section 16.3 to Avery's activities

Respondent argues that Avery's violation exists regardless of whether his activity was union activity, but in the same sentence

[24] Also see *Loyalhanna Health Care Associates*, 332 NLRB 933, 941 (2000) regarding animus towards an employee's participation in an unemployment hearing.

states it "bears on whether he had advance notice and his compliance with Section 16.3 of the CBA." (R. Br. at 13.)

Respondent's implemented rule specifies the types of activities that a union official must provide a week's notice and is subject to Respondent's approval based upon operating needs. The testimony makes it clear that Respondent applied Section 16.3 to Avery's participation in the unemployment hearing, presuming that his activity was union activity. Section 16.3 does not include participation in unemployment hearings or other governmental activity as part of the union activities that require a week's notice.

Giving the rule its plain meaning, Section 16.3's terms specifies what union events are included and an unemployment hearing is not one of them. As Respondent drafted the rule and implemented it over the Union's objections, it cannot now complain that the rule should cover governmental hearings, such as an unemployment hearing. Respondent discriminatorily applied Section 16.3 due to Respondent's perceived belief that Avery engaged in union activity with his participation in the unemployment hearing.

Respondent argues that the parties agreed to Section 16.3 in a collective-bargaining agreement in 2019. (R. Br. at 19.) Respondent contends that Section 16.3 was "lawfully negotiated between the Company and the Union . . . . Notably, Section 16.3 of the prior CBA also required one week's advance notice for employees to attend meetings. (R. Ex. 10).[25] The current CBA merely added specific types of meetings which the provision already covered." (R. Br. at 4 fn. 5.) This contention does not help Respondent's analysis.

The "collective-bargaining agreement" at the time of these events was the implemented terms and conditions. The record shows that the Union opposed Section 16.3. Respondent's contention that the implemented terms and conditions applied here is limited to the plain language of that provision, which does not include governmental meetings on the phone. Section 16.3 and the implemented terms and condition do not Respondent license to add more types of meetings in response to union activity or protected concerted activity.

Respondent alternatively argues that the unscheduled absence rules are present so that Respondent has ample time to find a replacement. (R. Br. at 19.) Respondent's reasons are unavailing because it had no need for a replacement on the day of May's unemployment hearing and during Avery's participation.

I therefore find that Respondent unlawfully suspended and terminated Avery when it over broadly applied Section 16.3 to Avery's participation in the unemployment hearing. See generally *American Tara Corp.*, 242 NLRB 1230, 1244–1245 (1979) (non-existent policy applied to terminate union adherent found unlawful).

C. Respondent's Additional Affirmative Defenses

Respondent's Answer puts forth several additional affirmative defenses, which are unsupported by the record. However, I specifically address whether the charges fell within the 6-month statute of limitations. Section 10(b) does not bar an otherwise untimely complaint allegation if the allegedly unlawful conduct occurred within 6 months of a timely-filed charge and is closely related to the allegations in that charge. *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 2 (2018), citing *Alternative Energy Applications, Inc*., 361 NLRB 1203, 1203 (2014). To determine if an otherwise untimely allegation is closely related to the timely charge, the Board considers: (1) whether the otherwise untimely allegation and the allegations in the timely-filed charge are of the same class, "i.e., whether the allegations involve the same legal theory and usually the same section of the Act"; (2) whether the otherwise untimely allegation and the allegations in the timely-filed charge arise from the same factual situation or sequence of events; and (3) whether the respondent would raise the same or similar defenses to the otherwise untimely allegation and the allegations in the timely-filed charge. *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988). To sufficiently plead a 10(b) defense, Respondent's answer or statement at hearing must specify the allegations it asserted were untimely. *United Government Security Officers of America International*, 367 NLRB No. 5, slip op. at 1 fn. 1 (2018).

Respondent did not specify the complaint paragraphs subject to its affirmative defense. (GC Exh. 1(i), Answer, Affirmative Defenses ¶¶2 and 3.) On that basis alone, Respondent does not demonstrate a sufficient affirmative defense. Further, the Union's charges were within the six-month statute of limitations. On June 7, the same day Respondent suspended Avery, the Union filed its initial charge. (GC Exh. 1(a).) The Union filed a first amended charge regarding Avery's termination on June 13, 2018, two days after Avery's discharge. (GC Exh. 1(c).) The Union filed a second amended charge, stating Respondent terminated and/or suspended Avery due to an overly broad rule on October 1, only about 5 months after Avery's suspension. (GC Exh. 1(e).) The time elapsed is still within the 6-month statute of limitations.

CONCLUSIONS OF LAW

1. Respondent Lhoist North America of Alabama, LLC, a Subsidiary of Lhoist North America (Respondent), is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 563 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following are Respondent's supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act:

a. Craig Gordinier	Montevallo Plant Manager
b. Grant McCallum	Montevallo Production Manager
c. Stacey Barry	Vice President, Human Resources
d. Emily Kelly f/k/a Emily Berkes	Human Resources Manager—East Lime
e. Terry Beam	Loading Supervisor

4. On June 7, 2018 and June 11, 2019 respectively, Respondent violated Section 8(a)(1) when it suspended and terminated its

[25] In support of its proposition that the Union could not complain about the terms and conditions now, Respondent cites *NLRB v. US Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). That case involves alleged Section 8(a)(5) violations.

employee Desilynn "Floyd" Avery based upon its overly broad application of Section 16.3 of the implemented terms and conditions.

5. On June 7, 2018 and June 11, 2019 respectively, Respondent violated Section 8(a)(1) when it suspended and terminated its employee Desilynn "Floyd" Avery for protected concerted activity.

6. On June 7, 2018 and June 11, 2019 respectively, Respondent violated Section 8(a)(3) and (1) when it suspended and terminated its employee Desilynn "Floyd" Avery for union activity.

7. The Act has not been violated in any other way.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(1) and Section 8(a)(3) and (1) by suspending and discharging employee Desilynn "Floyd" Avery, I shall order Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Benefits shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent is ordered to compensate Avery for his reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, Respondent is ordered to compensate Avery for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 10 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for him. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). Respondent is also ordered to remove from its files any references to the unlawful suspension and discharge of Avery and to notify him in writing that this has been done and that the unlawful suspensions and discharges will not be used against them in any way.

Because of the length of time since Avery's discharge, I order that Respondent mail the notices to bargaining unit employees who left Respondent's employ after June 7, 2018. Because Avery was the union vice president for a bargaining unit beyond the Montevallo facility, Respondent should also post the notice at its other unionized facilities in Alabama.

Upon the findings of facts and conclusions of law and upon the entire record, I issue the following recommended[26]

ORDER

Lhoist North America of Alabama, LLC, a Subsidiary of Lhoist North America (Respondent) shall

1. Cease and desist from

(a) Discharging, suspending or otherwise discriminating against employees because of their Union activities or because they have otherwise engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Desilynn "Floyd" Avery full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Desilynn "Floyd" Avery whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.

(c) Compensate Desilynn "Floyd" Avery for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension and discharges, and within 3 days thereafter, notify Desilynn "Floyd" Avery in writing that this has been done and the suspension and discharge will not be used against him in any way.

(e) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designed by the Board or its agents, all payroll records, social security payment records, time records, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its unionized Alabama facilities copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the

[26] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings conclusions and recommended Order shall, as provided in Section 102.48 of the Rule, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent also shall mail, at its own expense, the notice to former employees who left Respondent's employ after June 7, 2018. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at its Montevallo facility at any time since June 7, 2018.[28]

(g) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend or otherwise discriminate against you for engaging in Union activities or other protected concerted activities.

WE WILL NOT discharge, suspend or otherwise discriminate against you because you participated in an unemployment hearing on behalf of another employee.

WE WILL NOT over broadly apply rules to your actions as a basis to discipline you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, offer Desilynn "Floyd" Avery full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Desilynn "Floyd" Avery and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

WE WILL make Desilynn "Floyd" Avery whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any interim earnings, plus interest, and we will also make him whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Desilynn "Floyd" Avery for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

LHOIST NORTH AMERICA OF ALABAMA, LLC, A SUBSIDIARY OF LHOIST NORTH AMERICA

The Administrative Law Judge's decision can be found at or www.nlrb.gov/case/10-CA-221731 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1943.

[28] Posting provisions during the COVID-19 pandemic are subject to the qualifications stated in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68, slip op. at 3 (2020).